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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MARTIN JOSEPH ABADILLA, et al.,

Plaintiff,

v.

PRECIGEN, INC., et al.,

Defendants.

This Document Relates to:

ALL CONSOLIDATED ACTIONS

Case No.: 5:20-cv-06936-BLF

Dept.: Courtroom 3, 5th Floor
Judge: Honorable Beth Labson Freeman
Date: October 19, 2023 at 9:00 AM

LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION

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NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD, PLEASE TAKE NOTICE that, pursuant to the Court's Order Preliminarily Approving Settlement and Providing for Notice (ECF No. 135) ("Preliminary Approval Order"), on October 19, 2023 at 9:00 AM (PT), via Zoom, the Honorable Beth Labson Freeman presiding, the Court-appointed lead plaintiff, Raju Shah ("Lead Plaintiff") will and hereby does move the Court, pursuant to Federal Rule of Civil Procedure 23, for (1) entry of an order granting final approval of the proposed settlement (the "Settlement") set forth in the Stipulation of Settlement and Agreement dated March 1, 2023 (ECF No. 128) (the "Stipulation") and granting final certification of the proposed Settlement Class; and (2) entry of an order approving of the proposed Plan of Allocation.

This Motion is based on this Notice of Motion and Motion (together, the "Motion"); the supporting Memorandum that follows; the Stipulation; the accompanying declarations – including those of William C. Fredericks in Support of (A) Lead Plaintiff's Motion for Final Approval of Settlement and Plan of Allocation and (B) Plaintiff's Counsel's Fee and Expense Application, dated September 14, 2023 ("Fredericks Decl."); of Adam D. Walter Regarding (A) Mailing of Notice; (B) Publication of Summary Notice; and (C) Report on Requests for Exclusion Received To Date, dated September 11, 2023 ("Walter Decl."); and of Raju Shah in Support of Motion for (1) Final Approval of Class Action Settlement and (2) Award Pursuant to 15 U.S.C. §78u-4(a)(4) ("Shah Decl.") – all other prior pleadings and papers in this Action; the arguments of counsel; and any additional information or argument that may be required by the Court.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Court should grant final approval of the proposed Settlement as fair, reasonable, and adequate under Rule 23(e)(2), and grant final certification of the Settlement Class under Rule 23(a) and (b)(3) for settlement purposes; and

2. Whether the Court should approve the Plan of Allocation as fair, reasonable, and adequate.

MEMORANDUM OF POINTS AND AUTHORITIES

Lead Plaintiff, on behalf of himself and the Class, respectfully submits this memorandum in support of his motion for final approval of the proposed Settlement and Plan of Allocation, and for final certification of the Settlement Class for settlement purposes.[1]

PRELIMINARY STATEMENT

After more than two years of litigation – and an arms-length mediation process conducted under the auspices of a highly experienced mediator (the Hon. Layn Phillips, U.S.D.J., ret.) – Lead Plaintiff is pleased to submit for final approval the proposed Settlement, which will resolve all claims at issue in exchange for a payment of $13,000,000.00 in cash for the benefit of the Class.

The proposed Settlement readily satisfies Rule 23(e)(2)'s standards for final approval. Indeed, Lead Plaintiff respectfully submits that the proposed Settlement represents a decidedly favorable result for the Class in the face of very significant litigation risk on both liability and damages issues. Indeed, the risks at issue here are amply highlighted by the fact this Court, following extensive briefing on Defendants' motion to dismiss Plaintiff's Second Amended Complaint ("SAC"), ***dismissed*** all claims. Pursuant to leave of Court, Plaintiff prepared and filed a Third Amended Class Action Complaint ("TAC") that contained additional factual allegations, and Lead Counsel believed at all times that the claims asserted were meritorious. However, Defendants vigorously argued throughout the action that they lacked *scienter*, that their Class Period statements were not materially false or misleading when read in context, and that they had strong loss causation arguments under §10(b), such that, even if their §10(b) and/or §20(a) liability were otherwise established, recoverable damages would be substantially less than what Lead Plaintiff urged. In short, although Lead Plaintiff believed that he had responses to each of these arguments, there could be no assurance that the TAC would survive Defendants' renewed efforts to dismiss the case claims – let alone survive summary judgment and trial – had the litigation continued.

[1] All capitalized terms herein have the meanings given them in the Stipulation (ECF No. 128 at ¶¶1.1-1.53) or in the Fredericks Declaration filed herewith. Unless otherwise noted, in cited materials all internal quotation marks and citations are omitted, and all emphasis is added.

Significantly, the Settlement was only reached after the TAC was filed (and Defendants had given Plaintiff a draft of their motion to dismiss the TAC), and only after an extended arm's-length mediation process (and a full-day mediation session in November 2022) conducted under the auspices of Judge Phillips. Moreover, the Settlement is based on and fully consistent with Judge Phillips's "mediator's proposal," and the Stipulation of Settlement itself was not signed until after further months of negotiation and after Lead Counsel could complete their review of over 83,000 pages of internal documents that Precigen had produced as part of the mediation process. Fredericks Decl. ¶7. In sum, the proposed Settlement provides a substantial, certain, and immediate all-cash recovery for the Class, while avoiding the significant risks and expenses of continued litigation – including the real risk that the Class would recover nothing if further litigation had been pursued and the substantial $13 million "bird in the hand" rejected.

Following a hearing on July 6, 2023, the Court issued its Preliminary Approval Order (ECF No. 135) finding that the Settlement appeared sufficiently fair and reasonable to merit the issuance of Notice to the Settlement Class. While the deadline for objections has not yet passed, following the dissemination of 72,491 individual Notices to potential Settlement Class Members and Nominees (as well as publication of the summary notice online and in print), to date ***no*** objections to the Settlement or Plan of Allocation (and only one request to opt-out) have been received. Walter Decl., ¶¶8, 15-16; Fredericks Decl. ¶8. Should any written objections be received prior to the Fairness Hearing, Lead Plaintiff will address them in appropriate reply papers.

As discussed below, in addition to granting final approval to the Settlement, the Court should also approve the proposed Plan of Allocation, which was prepared in consultation with Lead Plaintiff's damages expert (and provides for a customary *pro rata* allocation of the Net Settlement Fund based on Class Members' respective "Recognized Losses") and grant final certification of the proposed Settlement Class for purposes of settlement.

ARGUMENT

I. THE PROPOSED SETTLEMENT MERITS FINAL APPROVAL

Federal Rule of Civil Procedure 23(e) requires judicial approval for any compromise or settlement of class-action claims. *See* Fed. R. Civ. P. 23(e). Whether to grant such approval lies

within the district court's sound discretion. *See In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 895 F.3d 597, 611 (9th Cir. 2018). In exercising this discretion, a court should be guided by the Ninth Circuit's "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 556 (9th Cir. 2019); *see also Taafua v. Quantum Glob. Techs., LLC*, No. 18-CV-06602-VKD, 2021 WL 579862, at *3 (N.D. Cal. Feb. 16, 2021) ("The Ninth Circuit has declared that a strong judicial policy favors settlement of Rule 23 class actions."). The settlement of complex cases like this one also promotes efficient utilization of scarce judicial resources and the speedy resolution of claims. *See Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV 08 1365 CW EMC, 2010 WL 1687832, at *10 (N.D. Cal. Apr. 22, 2010) ("Settlement avoids the complexity, delay, risk and expense of continu[ed] . . . litigation" and "produce[s] a prompt, certain, and substantial recovery for the [] class.").

Rule 23(e)(2) requires district courts to find that a proposed class action settlement is "fair, reasonable, and adequate" before it can be approved, *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1120-21 (9th Cir. 2020), based on their consideration of whether:

1. the class representative and class counsel have adequately represented the class;
2. the proposal was negotiated at arm's length;
3. the relief provided for the class is adequate, taking into account:
    (i) the costs, risks, and delay of trial and appeal;
    (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
    (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
    (iv) any agreement required to be identified under Rule 23(e)(3); and
4. the proposal treats class members equitably relative to each other.

Consistent with the foregoing Rule 23(e)(2) guidance, the Ninth Circuit has identified similar and/or overlapping factors (the *Churchill* factors) for courts to consider in evaluating proposed class action settlements:

> (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

Churchill Vill., L.L.C. v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004); *accord Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); *see also In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. MDL 2672, 2019 WL 2077847, at *1 (N.D. Cal. May 10, 2019) (approving settlement after considering both the Rule 23(e)(2) factors and the factors identified in Ninth Circuit case law).[2]

The Ninth Circuit has explained that courts' review of class-action settlements should be '"limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.'" *Hanlon*, 150 F.3d at 1027. Thus, a settlement hearing should "not to be turned into a trial or rehearsal for trial on the merits," *Officers for Just. v. Civ. Serv. Comm'n of City & Cnty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982), and a court need not "reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992); *accord Lane*, 696 F.3d at 819.

At preliminary approval, the Court found that the relevant factors showed that the Settlement was likely fair, reasonable, and adequate, subject to further review at the Fairness Hearing. ECF No. 135. Nothing has changed to alter the Court's prior analysis or to warrant a

[2] In this regard, it should be noted that the stated goal of the 2018 amendments to Rule 23(e)(2) was "not to displace" any of the factors historically articulated by the various Circuits, '"but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.'" *Campbell*, 951 F.3d at 1121 n.10. Accordingly, courts should '"appl[y] the framework set forth in Rule 23, while continuing to draw guidance from the Ninth Circuit's factors and relevant precedent.'" *Hefler v. Wells Fargo & Co.*, No. 16-CV-05479-JST, 2018 WL 6619983, at *4 (N.D. Cal. Dec. 18, 2018).

different conclusion now. *See In re Chrysler-Dodge-Jeep Ecodiesel® Mktg., Sales Pracs., & Prods. Liab. Litig.*, No. 17-MD-02777-EMC, 2019 WL 2554232, at *2 (N.D. Cal. May 3, 2019) (court's reasons for granting preliminary approval weighed "equally in favor of final approval now").

A. The Class Has Been Adequately Represented Throughout

At the settlement approval stage, the first Rule 23 consideration is whether "the class representatives and class counsel have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A). To determine adequacy, courts consider two questions: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members; and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011).

Here, Lead Plaintiff's claims, which are based on a common course of alleged misconduct by Defendants, are typical of those of the Class, and Lead Plaintiff has no interests antagonistic to those of other Class members. *Id.* (adequacy depends on "an absence of antagonism" and "a sharing of interest" between representatives and absent class members); *Hanlon*, 150 F.3d at 1020. Lead Plaintiff – like all other Class Members – also has a common interest in obtaining the largest possible recovery from Defendants. *See In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) ("Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between the class representatives and other class members.").

Lead Counsel have also plainly shown their commitment to the Class by vigorously prosecuting the Action for more than two years. Fredericks Decl., ¶¶53-62. And for his part, Lead Plaintiff has also shown his adequacy and commitment to the Class by, *inter alia*, retaining counsel highly experienced in securities class action litigation; reviewing pleadings and briefs; and communicating regularly with Plaintiffs' Counsel regarding the case, including both litigation and settlement development. *See generally* Shah Decl., ¶¶5-7. *See also Churchill*, 361 F.3d at 576-77 (instructing courts to consider the "experience and views of counsel").

B. The Settlement Is the Product of Arm's-Length Negotiations by Informed Counsel

As noted above, the proposed Settlement was not only "negotiated at arm's length," Fed. R. Civ. P. 23(e)(2)(B), but was negotiated by counsel who had a firm understanding of the strengths and weakness of their case from having, *inter alia*: conducted an extensive pre-filing investigation; fully briefed Defendants' motions to dismiss the SAC; conducted further investigative work (and taken further confidential witness interviews) prior to filing the TAC; consulted extensively with damage and loss causation experts; and exchanged comprehensive mediation submissions with Defendants. Moreover, the Stipulation itself was not finally signed until after Lead Counsel had reviewed both a limited set of internal Precigen documents prior to the November mediation session, as well as a much larger set of such documents produced to them shortly thereafter. *See* Fredericks Decl., ¶¶15, 17, 21, 25-27, 29; *see also* Churchill factors (5) and (6) above; *In re Netflix Priv. Litig.*, No. 5:11-CV-00379 EJD, 2013 WL 1120801, at *4 (N.D. Cal. Mar. 18, 2013) (courts "afford[] a presumption of fairness and reasonableness . . . [where] agreement was the product of non-collusive, arms' length negotiations conducted by capable and experienced counsel"); *Hefler*, 2018 WL 4207245, at *9 (approving settlement reached only after the parties engaged in motion practice and participated in protracted mediation); *Linney v. Cellular Alaska P'ship*, No. C-96-3008 DLJ, 1997 WL 450064, at *5 (N.D. Cal. July 18, 1997) ("involvement of experienced class action counsel," and fact that agreement was reached after relevant discovery had taken place, "create a presumption that the agreement is fair"), *aff'd*, 151 F.3d 1234 (9th Cir. 1998). Moreover, here "[t]he involvement of a neutral mediator is [further] evidence that settlement negotiations were conducted at arm's length." *Joh v. Am. Income Life Ins. Co.*, No. 18-CV-06364-TSH, 2020 WL 109067, at *7 (N.D. Cal. Jan. 9, 2020); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 327 (N.D. Cal. 2018) (same). And, any suggestion of collusion is further dispelled here because the Settlement's terms are based on a "mediator's proposal" made by a retired federal judge (the Hon. Layn Phillips). Fredericks Decl. at ¶¶27-28.

Finally, the proposed Settlement has none of the indicia of possible collusion identified by the Ninth Circuit, such as a "clear-sailing" fee agreement or a provision that would allow settlement proceeds to revert to Defendants. *Compare In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) *with* Stipulation, ¶2.3 ("The Settlement is not a claims-made

settlement. Upon the occurrence of the Effective Date, no . . . person or entity who or which paid any portion of the Settlement Amount . . . shall have any right to the return of the Settlement Fund or any portion thereof for any reason whatsoever.").

C. Adequacy of Recovery in Light of Litigation Risk and Other Rule 23(e)(2) Factors

The remaining Rule 23(e)(2) factors overlap considerably with the *Churchill* factors (1)-(4), and all entail a review of the benefits of the proposed settlement in light of relevant litigation risk. *See generally* Fed. R. Civ. P. 23(e)(2) Advisory Comm. Notes to 2018 Amendment; *Hanlon*, 150 F.3d at 1026. These factors also weigh strongly in favor of approval.

1. The Amount of the Proposed Settlement

"The critical component of any settlement is the amount of relief obtained by the class." *Destefano v. Zynga, Inc.*, No. 12-CV-04007-JSC, 2016 WL 537946, at *11 (N.D. Cal. Feb. 11, 2016). However, '"[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair.'" *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (citation omitted). In assessing the recovery, a fundamental question is how the value of the settlement compares to the amount the Class potentially could recover at trial, as discounted for risk, delay, and expense. '"Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation.'" *Officers for Justice*, 688 F. 2d at 624; *see also Shapiro v. JPMorgan Chase & Co.*, No. 11 CIV. 7961 CM, 2014 WL 1224666, at *11 (S.D.N.Y. Mar. 24, 2014) (settlement must be judged '"not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case'"); *Mild v. PPG Indus., Inc.*, No. 218CV04231, 2019 WL 3345714, at *6 (C.D. Cal. July 25, 2019) ("Based on the significant risks of continued litigation and the Settlement amount, the Court finds that the amount offered for settlement is fair.").

Here, based on a number of objective metrics, the $13 million Settlement compares favorably to other securities class action settlements. Lead Plaintiff's damages expert estimated

that the range of reasonably recoverable damages in this case was roughly $135 million to $270 million. Fredericks Decl., ¶¶38, 42. Thus, the $13 million Settlement represents approximately 5% of the high end of this range, which assumes that Lead Plaintiff would not only survive dismissal, but also ultimately run the table on all reasonably disputable liability and loss causation issues at summary judgment and trial (while avoiding any reversals on appeal). Fredericks Decl., ¶42. By comparison, NERA Economic Consulting recently reported that, between 2011 and 2022, the median securities class action settlement equated to roughly 2.8% of maximum damages in cases involving estimated investor losses between $100 million and $199 million, and 2.3% for estimated investor losses between $200 million and $399 million.[3] In addition, based on other published analysis, the Settlement is almost double the size of the median securities class action settlement ($6.9 million) in the Ninth Circuit between 2012 and 2021.[4]

Unsurprisingly, case law in this Circuit similarly confirms that the recovery under the proposed Settlement is well within the "range of reasonableness" when considered as a percentage of maximum reasonably recoverable damages. *See, e.g.*, *Farrar v. Workhorse Grp., Inc.*, No. CV2102072, 2023 WL 5505981, at *7 (C.D. Cal. July 24, 2023) (approving settlement representing roughly 3% of estimated damages); *Int'l Bhd. of Elec. Workers Loc. 697 Pension Fund v. Int'l Game Tech., Inc.*, No. 3:09-CV-00419, 2012 WL 5199742, at *3 (D. Nev. Oct. 19, 2012) (approving settlement representing "about 3.5% of the maximum damages that Plaintiffs believe[d] could be recovered" and finding it "within the median recovery in securities class actions settled in the last few years"); *Destefano*, 2016 WL 537946, at *11 (citing Cornerstone Report indicating that securities class action settlements between 2013 and 2015 involved a median recovery of 2.2% of estimated damages); *In re LJ Int'l, Inc. Sec. Litig.*, No. CV0706076, 2009 WL 10669955, at *4 (C.D. Cal. Oct. 19, 2009) (approving settlement recovering 4.5% of maximum

[3] *See* J. McIntosh & S. Starykh, *Recent Trends In Securities Class Action Litig.: 2021 Full-Year Review*, NERA ECON. CONSULTING at 23 (Jan. 25, 2022), located at www.nera.com/publications/archive/2022/recent-trends-in-securities-class-action-litigation 2021-full-y.html.

[4] *See* L. Bulan & L. Simmons, *Securities Class Action Settlements: 2021 Review and Analysis*, Cornerstone Research at 19 (2022), located at https://www.cornerstone.com/wp-content/uploads/2022/03/Securities-Class-Action-Settlements-2021-Review-and-Analysis.pdf.

damages); *In re Broadcom Corp. Sec. Litig.*, No. SACV01275, 2005 WL 8153007, at *6 (C.D. Cal. Sept. 14, 2005) (approving settlement representing 2.7% of damages, and finding such percentage was "not [] inconsistent with the average recovery in securities class action[s]").

2. The Strengths and Weaknesses of the Case (Other Risk Factors)

To determine whether the proposed Settlement is fair, reasonable, and adequate, the Court "must balance the risks of continued litigation, including the strengths and weaknesses of plaintiff's case, against the benefits afforded to class members, including the immediacy and certainty of recovery." *Knapp v. Art.com, Inc.*, 283 F. Supp. 3d 823, 831 (N.D. Cal. 2017); *accord Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993).

The risks of litigation here were plainly substantial, and some of the challenges that Lead Plaintiff faced in prevailing on liability were made clear early on. For example, at oral argument on Defendants' motion to dismiss on April 8, 2022, as noted above the Court raised doubts about various aspects of Plaintiff's main claims under §10(b) and SEC Rule 10b-5(b). In particular, although the Court ultimately found in its Order Granting Defendants' Motion to Dismiss with Leave to Amend (ECF No. 111) (the "MTD Order") that Lead Plaintiff had adequately alleged that certain statements from the first part of the Class Period were misleading because they purported to describe test results based on use of natural gas (when Lead Plaintiff alleged that they had instead been obtained using pure methane), the MTD Order ***also*** found that numerous other statements were ***not*** actionable. These statements were largely from the latter half of the Class Period and included Defendants' various statements that Precigen's Methane Bioconversion Platform ("MBP") had reached "in the money" status with respect to being able to produce certain chemicals. Lead Counsel believed that the Court's findings that these and certain other key false and misleading statements at issue were not actionable was incorrect – and hoped to so persuade the Court on repleading – but there could be no assurance that the Court would have reversed course after reviewing the TAC's efforts to replead those claims. Fredericks Decl., ¶36.

Moreover, as courts regularly observe, proving that Defendants acted with *scienter* in §10(b) cases is almost always a daunting challenge, and this case was no exception. First, although Defendant Walsh (the executive who headed the MBP Program) was the defendant most at risk of

being found to have acted with *scienter* (based primarily on his closeness to the program), he retired from the Company well before the end of the Class Period, and he personally made only a few of the allegedly false or misleading statements at issue. Moreover, Walsh did not engage in any suspicious stock sales during the Class Period – a factor that makes it significantly harder for Lead Plaintiff to plead (and later prove) that he acted with *scienter*. And the Court had already rejected Lead Plaintiff's reliance on certain confidential witnesses ("CWs") to support the requisite "strong inference" of Mr. Walsh's *scienter*, so once again, there could be no assurance that Lead Plaintiff's reliance on many of the same CWs in the TAC would cause the Court to reach a different view as to Walsh's *scienter*. Second, with respect to Defendant Kirk, Precigen's former chief executive officer, and the only other individual defendant, the challenges of pleading and proving his *scienter* were even greater, as (i) he was much more removed from the MBP Program than Walsh, (ii) the CW allegations against Kirk were significantly weaker than they were as to Walsh, and (iii) Kirk (like Walsh) also did not sell a suspiciously large percentage of his Precigen shares during the Class Period. Fredericks Decl., ¶37.

In addition, Defendants also had significant loss causation defenses. This case, for example, did not involve a single large drop in Precigen's share price in response to a "clean" disclosure that one or more of Defendants' prior statements about the MBP Program had been false. Instead, this case involved a series of roughly ten "partial corrective disclosure dates," with Plaintiff alleging that the truth about Defendants' alleged misstatements and omissions only emerged gradually over a multi-year period. On the facts alleged, proving loss causation was particularly challenging because on certain alleged "partial corrective disclosure dates" the negative stock price reaction was not statistically significant, and even on dates when there was a statistically significant reaction, there were other negative (and hence potentially "confounding") disclosures relating to non-MBP-related aspects of Precigen's business. As a result, proving that the observed price declines on such dates were related to fraud-related disclosures (as opposed to unrelated matters) would likely be difficult. After considering these and other loss causation issues, as noted above, Lead Plaintiff's damages expert estimated that the range of reasonably recoverable damages in this case was roughly $135 million to $270 million – but unsurprisingly

Defendants contended that maximum recoverable damages were a fraction of such amounts. Fredericks Decl. ¶38; *see also, e.g.*, *Brown v. China Integrated Energy Inc.*, No. CV1102559, 2016 WL 11757878, at *7 (C.D. Cal. July 22, 2016) (citing inherent risks where "both sides' arguments on loss causation and establishing damages at trial would have relied heavily on expert testimony, with no guarantee of whose testimony the factfinder would credit").

Nonetheless, despite these risks, Lead Plaintiff obtained a $13 million Settlement that represents a decidedly superior result. Moreover, this recovery must be compared to the real risk that the Class would recover nothing after summary judgment, trial, and likely appeals, possibly years into the future. *See Mild*, 2019 WL 3345714, at *6 (recognizing the "significant risk that continued litigation might yield a smaller recovery or no recovery at all"); *In re Portal Software, Inc. Sec. Litig.*, No. C-03-5183 VRW, 2007 WL 4171201, at *3 (N.D. Cal. Nov. 26, 2007) (same). Indeed, even if Lead Plaintiff had prevailed in full on all his claims against Defendants, the chances that he could collect on a judgment that would be significantly greater than $13 million (let alone one anywhere near the Class's maximum reasonably recoverable damages) is doubtful at best. For example, Precigen's business has been in sharp decline in recent years and on November 9, 2022 – just a week before the Parties' face-to-face mediation session with Judge Phillips – Precigen reported in its Form 10-Q for the third quarter of 2022 that there was "substantial doubt about the Company's ability to continue as a going concern." Fredericks Decl., ¶39. In addition, Defendants have only limited available insurance coverage, which could well have been fully exhausted had Lead Plaintiff elected to litigate the Class's claims through discovery, summary judgment, trial, and likely appeals. *Id.*; *see also, e.g.*, *Farrar*, 2023 WL 5505981, at *6 ('"It is not unreasonable for counsel and the class representative to prefer the bird in hand, given concerns about Diamond's strained financial state and its ability to pay a judgment following further litigation.'") (cleaned up), quoting *In re Diamond Foods, Inc., Sec. Litig.*, 2014 WL 106826, at *2 (N.D. Cal. Jan. 10, 2014).

In sum, the proposed Settlement is fair and reasonable in light of the significant risks of continued litigation.

3. Complexity, Expense, and Expected Duration of Further Litigation

Courts consistently recognize that the likely duration and costs of continued litigation are major factors in evaluating the reasonableness of a settlement. *See, e.g., Torrisi*, 8 F.3d at 1376 (finding that "the cost, complexity and time of fully litigating the case" rendered the settlement fair). '"Generally, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.'" *In re Linkedln User Priv. Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015). Due to their "notorious complexity," settlement of securities class actions is often particularly appropriate to "circumvent[] the difficulty and uncertainty inherent in long, costly trials." *In re AOL Time Warner, Inc.*, No. 02 CIV. 5575, 2006 WL 903236, at *8 (S.D.N.Y. Apr. 6, 2006); *see also In re Heritage Bond Litig.*, No. 02-ML-1475, 2005 WL 1594403, at *6 (C.D. Cal. June 10, 2005) (securities actions have well-deserved reputation for complexity).

Here, absent the proposed Settlement, continued litigation would have required further extensive motion to dismiss briefing directed at the TAC, to be followed by (assuming that dismissal was denied): (i) the undertaking of comprehensive document discovery that, to a significant degree, would have undoubtedly involved highly technical materials regarding Precigen's novel methane bioconversion technologies and testing programs; (ii) the taking of depositions of numerous Precigen officers and employees on the details of those same highly technical programs; (iii) an expert discovery process that was expected to include, at a minimum, both sides retaining experts on measuring achievement of bio-technological development milestones and other technical issues, as well as on loss causation and damages issues; (iv) full briefing of a contested class certification motion, and related expert discovery; (v) the all but inevitable motions by Defendants for summary judgment; and then (assuming that Plaintiff successfully opposed such motions) (vi) extensive pre-trial motions *in limine* and *Daubert* motions; (vii) trial; and (viii) likely post-trial motions, and thereafter appeals, by the losing side. Such further litigation and appeals would not only have been enormously costly, but would also almost certainly take several more years to play out. Fredericks Decl., ¶43; *see also Zynga*, 2016 WL 537946, at *10; *In re Amgen Inc. Sec Litig*, No. CV 7-2536, 2016 WL 10571773, at *3 ("A

trial of a complex, fact-intensive case . . . [as here] . . . could have taken weeks, and the likely appeals of rulings on summary judgment and at trial could have added years to the litigation.").

In short, absent a settlement, resolution of this case would plainly require considerable time and additional expense, with the result not remotely certain. *See Hartless v. Clorox Co.*, 273 F.R.D. 630, 640 (S.D. Cal. 2011) ("Considering these risks, expenses and delays, an immediate and certain recovery for class members . . . favors settlement of this action."); *Velazquez v. Int'l Marine & Indus. Applicators, LLC*, No. 16CV494, 2018 WL 828199, at *4 (S.D. Cal. Feb. 9, 2018) (courts should "consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation"). Accordingly, the expense, complexity, and likely duration of further litigation, also strongly support approving the proposed Settlement, and taking the $13 million "bird in the hand."

4. Risks of Obtaining and Maintaining Class Action Status

While Lead Counsel are confident that the Settlement Class meets the requirements for certification, in counsel's experience modern Defendants almost always challenge class certification, and accordingly there could again be no certainty on this issue. *See also, e.g., In re Omnivision Techs., Inc.*, 559 F. Supp. 2d at 1041 (N.D. Cal. 2008) (even if class were certified, "there is no guarantee the certification would survive through trial, as Defendants might have sought decertification or modification of the class"). Accordingly, this factor also supports approval of the Settlement.

5. Extent of Discovery Completed and Stage of Proceedings

In assessing a settlement, courts should consider the stage of the proceedings and the amount of information available to the parties to assess the strengths and weaknesses of their case. *See, e.g., Mego Fin. Corp.*, 213 F. 3d at 459; *In re Rambus Inc. Derivative Litig.*, No. C 06-3513 JF (HRL), 2009 WL 166689, at *2 (N.D. Cal. Jan. 20, 2009). Moreover, "[a] settlement following sufficient discovery and genuine arms-length negotiation is presumed fair." *Velazquez*, 2018 WL 828199, at *5.

From the commencement of this Action in 2020, through the signing of the Parties' Stipulation of Settlement in March 2023, Lead Counsel spent substantial time and resources analyzing and litigating the factual and legal issues involved in the Action. As the Court itself can attest, counsel for both sides had a strong understanding of the key legal issues involved, as reflected in their comprehensive briefing on Defendants' motion to dismiss the SAC. As for understanding of the facts, although this case did not reach the formal discovery stage, the factual detail reflected in the SAC and TAC is indicative of the broad extent of Lead Counsel's pre-filing investigation – including the interviewing of multiple CWs – that they conducted and continued to vigorously pursue in connection with the preparation of both the SAC (which the Court dismissed) and the TAC (which was pending when the settlement was reached). Fredericks Decl., ¶7. Moreover, in addition to preparing and exchanging multiple comprehensive mediation briefs with Defendants as part of Judge Phillip's mediation process – Lead Counsel were able to obtain and review a limited number of internal Precigen documents that they had requested of Defendants prior to November 2022 face-to-face mediation session, and Lead Plaintiff did not finalize or agree to the actual Stipulation of Settlement until after his counsel had sought, received, and reviewed a significantly larger production of roughly 83,000 pages of additional internal Precigen documents. Fredericks Decl., ¶7, 25, 29.

In sum, when the Settlement was consummated, the litigation "had proceeded to a point at which both parties had a clear view of the strengths and weaknesses of their cases." *Zynga, Inc.*, 2016 WL 537946, at *12. This factor therefore also supports final approval of the Settlement.

6. The Experience and Views of Counsel

As courts in this Circuit have explained, "[t]he recommendation of experienced counsel carries significant weight in the court's determination of the reasonableness of the settlement." *Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal. 1988); *see also Nat'l Rural Telecommunications Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) ('"Great weight' is accorded to the recommendation of counsel . . . because 'parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation"); *Churchill*, 361 F .3d at 575. Here, Lead Counsel –

based on a thorough understanding of the strengths and weaknesses of the Action – have concluded that the proposed Settlement represents a decidedly superior outcome for Class Members in the face of very significant litigation risk. Fredericks Decl., ¶7. Accordingly, this factor also strongly supports approval.

7. Existence of a Governmental Participant

Here, there was a prior governmental investigation into a portion of the claims alleged, which resulted in imposition of only a minor financial penalty totaling $2.5 million under §13 of the Exchange Act. However, the findings of that SEC investigation did not result in any allegations of fraud (as §13 has no *scienter* element), and (as Defendants have repeatedly pointed out) were limited to settled allegations involving alleged misstatements – all of which were from 2017, and which involved no admissions of even innocent misstatement by any Defendant. Accordingly, Lead Plaintiff still bore the full brunt of trying to establish that the numerous alleged misstatements from the last three years of the Class Period (up through September 25, 2020) were actionable – and, as to all claims in *this* Action, Lead Plaintiff would still have to plead and prove *scienter*, loss causation, and damages. In sum, while the SEC's investigative work provided an assist, this is decidedly not a case were Plaintiff could have had a "free ride" to any settlement – let alone a better settlement than the $13 million recovery obtained here – or where Plaintiff failed to pick up (with a vengeance) where the SEC had stopped. Fredericks Decl., ¶40. Accordingly, this factor does not diminish the approvability of the Settlement. *In re Wells Fargo Collateral Prot. Ins. Litig.*, No. SAM1702797, 2019 WL 6219875, at *3 (C.D. Cal. Nov. 4, 2019).

8. The Class's Reaction

"In addition to the enumerated fairness factors of Rule 23(e)(2), courts within the Ninth Circuit typically consider the reaction of the class members to the proposed settlement." *In re Google LLC St. View Elec. Commc'ns Litig.*, 2020 WL 1288377, at *15 (N.D. Cal. Mar. 18, 2020); *see also Churchill*, 361 F.3d at 577. "The absence of a large number of objectors supports the fairness, reasonableness, and adequacy of the settlement." *Velazquez*, 2018 WL 828199, at *6. Here, as of September 11, 2023, although Notice has been mailed to 72,491 potential Class Members and Nominees, ***no*** objections to the Settlement have been submitted, only one request

for exclusion has been received. Walter Decl., ¶15-16; Fredericks Decl., ¶8. This factor is thus on track to also be strongly supportive of the Settlement. Should any objections be received after the date of this brief, Lead Plaintiff will address them in reply papers.

9. All Other Rule 23(e)(2) Factors Support Approval of the Settlement

Rule 23(e)(2)(C) also instructs courts to consider whether the relief provided for the class is adequate considering "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims," "the terms of any proposed award of attorney's fees, including timing of payment," and "any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv). Each of these factors also supports approval of the proposed Settlement or is neutral and provides no basis for a finding that the Settlement is inadequate.

First, the procedures for processing Class Members' claims and distributing the proceeds of the Settlement to eligible claimants are well-established, effective methods that have been widely used in securities class action litigation. The proceeds of the Settlement will be distributed to Class Members who submit eligible Claim Forms with required documentation to the Court-approved Claims Administrator, A.B. Data, an independent firm with extensive experience administering securities class actions. It will (1) review and process the claims, (2) provide claimants with an opportunity to cure any deficiencies in their claims or request review of the denial of their claims by the Court, (3) and then mail or wire claimants their *pro rata* shares of the Net Settlement Fund (as calculated under the Plan of Allocation) upon approval of the Court. Stipulation, ¶¶4.5-4.14. This type of claims processing is standard in securities class actions and has long been used and found to be effective.

Second, the relief provided for the Class in the Settlement is also adequate when the terms and timing of the proposed award of attorney's fees is considered. As discussed in the accompanying Fee Memorandum, the requested 25% fee is reasonable in light of *inter alia* Plaintiff's Counsel's efforts in the superior recovery obtained in the face of significant litigation risk. Indeed, the requested fee is consistent with the 25% "benchmark" for percentage fee awards in the Ninth Circuit and the range of percentage fees that courts within this Circuit award for

similarly sized settlements. The requested fee represents a 1.62 multiplier, which is also well within the range of multipliers awarded in similar cases. With respect to the Court's consideration of the fairness of the Settlement, the approval of the requested attorneys' fees is also entirely separate from approval of the Settlement, and neither Lead Plaintiff nor Lead Counsel may terminate the Settlement based on this Court's or any appellate court's ruling with respect to attorneys' fees. Stipulation, ¶7.5.

Lastly, Rule 23(e)(2)(C) asks the Court to consider the proposed Settlement's fairness in light of any agreements required to be identified under Rule 23(e)(3). *See* Fed. R. Civ. P. 23(e)(2)(C)(iv). As previously disclosed, the only agreement the Parties entered into other than the Stipulation itself is a confidential Supplemental Agreement regarding requests for exclusion Stipulation, ¶10.5. The Supplemental Agreement gives Defendant Precigen the right to terminate the Settlement if the valid requests for exclusion received from persons and entities entitled to be members of the Class exceeds an amount agreed to by the Parties. This type of agreement is standard in securities class actions and has no negative impact on the fairness of the Settlement. *See, e.g., Hefler*, 2018 WL 4207245, at *11 ("The existence of a termination option triggered by the number of class members who opt out of the Settlement does not by itself render the Settlement unfair.").

10. The Settlement Treats Class Members Equitably

In determining whether a class action settlement is "fair, reasonable, and adequate," the Court must also consider whether the Settlement treats class members equitably relative to one another. Fed. R. Civ. P. 23(e)(2)(D). Here, as discussed immediately below in Part II, the proposed Settlement easily meets these final criteria, as the Plan of Allocation provides that each eligible claimant will receive their *pro rata* share of the recovery based on damages that they suffered attributable to the alleged fraud. In other words, no member or subset of the Class is receiving any special treatment, and Lead Plaintiff will receive the same level of *pro rata* recovery under the Plan of Allocation (based on his Recognized Claim as calculated under the Plan) as all other Class Members.

* * *

In sum, all of the factors to be considered under Rule 23(e)(2) and Ninth Circuit case law support a finding that the proposed Settlement is fair, reasonable, and adequate.

II. THE PLAN OF ALLOCATION IS ALSO FAIR, REASONABLE AND ADEQUATE

The standard for approving a plan of allocation under Rule 23 is the same as that for approving a settlement: it must be fair, reasonable, and adequate. *Class Plaintiffs*, 955 F.2d at 1284-85; *Hampton v. Aqua Metals, Inc*., No. 17-CV-07142-HSG, 2021 WL 4553578, at *10 (N.D. Cal. Oct. 5, 2021). "An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent counsel." *Vinh Nguyen v. Radient Pharms. Corp*., No. SACV 11-00406, 2014 WL 1802293, at *5 (C.D. Cal. May 6, 2014); *see also Heritage Bond*, 2005 WL 1594403, at *11. Further, "[a] plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable." *In re Oracle Sec. Litig.*, No. C-90-0931-VRW, 1994 WL 502054, at *1 (N.D. Cal. June 18, 1994).

Here, the Plan of Allocation (as set forth at pages 11-14 of the Notice, attached as Exhibit A to the Walter Declaration) ("POA") was developed by Lead Counsel in consultation with Lead Plaintiff's consulting damages expert – a Ph.D.-holding financial economist and chartered financial analyst ("C.F.A.") with over 25 years of experience in advising on (among other things) damages, loss causation, and plan of allocation issues in federal securities cases. The objective of the POA is to equitably distribute the Net Settlement Fund among Authorized Claimants. In short, the POA proposes that the Net Settlement Fund be allocated to Authorized Claimants (*i.e.*, those who submit a completed Claim Form to the Claims Administrator that is ultimately approved for a payment) on a *pro rata* basis based on the relative size of their Recognized Claims, where their Recognized Claims are, in turn, based on that portion of the losses on their Class Period purchases of Precigen shares that can be fairly attributed to the Defendants' misconduct as alleged in the TAC. In other words, the POA is based on the declines in value of Precigen common stock that occurred following partial disclosure events, which gradually disclosed the truth concerning the true state of Precigen's MBP program (which, in turn, reduced the amount of artificial inflation in the stock price allegedly caused by the alleged misstatements and omissions at issue). Fredericks Decl., ¶¶45-46.

The Plan is based upon the estimated amount of artificial inflation in the per share price of Precigen (f/k/a Intrexon) common stock (ticker PGEN, formerly XON) during the Settlement Class Period. To have a Recognized Claim under the Plan, a Claimant must have purchased or otherwise acquired their shares during the Settlement Class Period (*i.e.*, between May 10, 2017 and September 25, 2020, inclusive) and held them through one or more of the alleged corrective disclosure dates that removed the alleged artificial inflation caused by Defendants' alleged misrepresentations. A Claimant's loss under the Plan will depend upon several factors, including the date(s) when the Claimant purchased/acquired their Precigen shares during the Settlement Class Period, and whether such shares were sold (and if so, when and at what price), while taking into account the statutory limitation on recoverable damages under the Private Securities Litigation Reform Act ("PSLRA"). The sum of an Authorized Claimant's Recognized Loss Amounts for all their Settlement Class Period purchases/acquisitions is that claimant's "Recognized Claim," and the Net Settlement Fund will be allocated to Authorized Claimants on a *pro rata* basis based on the relative size of their Recognized Claims. Notice at 11, 13. In Lead Counsel's experience, this type of allocation formula (as customized to the facts of this case by Lead Plaintiff's expert) is fully consistent with customary practice in other securities class actions. Fredericks Decl., ¶46.

One hundred percent of the Net Settlement Fund will be distributed to Class Members who submit eligible claims. *See* Stipulation, ¶¶2.3, 4.14-4.15. To reduce administrative costs, the Plan provides that "Recognized Claims" of less than $10 will not be paid. If any funds remain after an initial distribution to Authorized Claimants, as a result of uncashed or returned checks or other reasons, subsequent cost-effective distributions will be conducted. Notice at 13; Stipulation, ¶4.15. If any residual funds remain after all cost-effective distributions of the Net Settlement Fund to Authorized Claimants have been completed, the Stipulation identifies the Investor Protection Trust ("IPT") as the proposed *cy pres* recipient. *Id.* The IPT is a 501(c)(3) nonprofit organization devoted to investor education (*see* Stipulation, ¶14.15) and is an appropriate *cy pres* recipient because its mission relates to the nature of the securities fraud claims asserted in the Action, and courts in this Circuit have approved it as a *cy pres* recipient in other securities fraud class actions in recent years. *See, e.g.*, *Fleming v. Impax Lab'ys Inc.*, No. 16-CV-06557-HSG, 2022 WL

2789496, at *2 (N.D. Cal. July 15, 2022); *In re Illumina, Inc. Sec. Litig.*, No. 3:16-CV-3044, 2021 WL 1017295, at *9 (S.D. Cal. Mar. 17, 2021); *In re Capston Turbine Corp. Sec. Litig.*, No. CV1589142, 2020 WL 7889062, at *2 (C.D. Cal. Aug. 26, 2020); *Hefler*, 2018 WL 6619983, at *11.

Notably, 72,491 copies of the Notice, which contains the Plan of Allocation and advises Class Members of their right to object to the Plan, have been mailed to potential Class Members and Nominees, but no objections to the Plan have been received to date. Walter Decl., ¶16; Fredericks Decl., ¶8. In sum, the proposed Plan of Allocation should also be approved as fair, reasonable, and adequate.

III. THE COURT SHOULD GRANT FINAL CERTIFICATION OF THE SETTLEMENT CLASS FOR SETTLEMENT PURPOSES

As set forth in Plaintiff's motion for preliminary approval of the Settlement, the Settlement Class satisfies all of the requirements of Rules 23(a) and (b)(3). ECF No. 128 at 19-22; *See also* Preliminary Approval Order, ECF No. 135, ¶¶1-4. None of the facts supporting certification of the Settlement Class have changed since Plaintiff submitted their preliminary approval motion. Accordingly, Plaintiff respectfully requests that the Court should finally certify the Settlement Class under Rules 23(a) and (b)(3) for purposes of effectuating the Settlement.

IV. NOTICE TO THE CLASS SATISFIED THE REQUIREMENTS OF RULE 23, DUE PROCESS, AND THE PSLRA

Plaintiffs have provided the Settlement Class with adequate notice of the Settlement. Here, Court-approved Notice Plan satisfied both: (i) Rule 23, as it was "the best notice . . . practicable under the circumstances" and directed "in a reasonable manner to all class members who would be bound by the" Settlement, Fed. R. Civ. P. 23(c)(2)(B) & (e)(1)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974); *In re MGM Mirage Sec. Litig.*, 708 F. App'x 894, 896 (9th Cir. 2017); and (ii) due process, as it was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950); *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994).

In accordance with the Court's Preliminary Approval Order, A.B. Data, the Court-appointed Claims Administrator, began mailing copies of the Notice and Proof of Claim form (collectively, the "Notice Packet") on July 28, 2023, and as of September 11, 2023, had sent by first class mail a total of 72,491 copies of these materials to potential Class Members and nominees. Walter Decl., ¶3-5, 8. In addition, A.B. Data arranged for the Summary Notice to be published in *Investor's Business Daily* and to be transmitted over the internet via *PRNewswire*. *Id.*, ¶9. A.B. Data also established a dedicated settlement website and to provide potential Class Members with information concerning the Settlement and access to downloadable copies of the Notice, Claim Form, and the Stipulation, among other documents, and staffs with live operators during business hours a toll-free number that Class Members may call for information about the Settlement or claims process. *Id.*, ¶¶10-14.

The notices apprised Settlement Class Members of, *inter alia*: (i) the amount of the Settlement; (ii) the reasons why the Parties are proposing the Settlement; (iii) the estimated average recovery per affected share of Precigen common stock; (iv) the maximum amount of attorneys' fees and expenses that will be sought; (v) the identity and contact information for a representative of Plaintiff's Lead Counsel whom is available to answer questions concerning the Settlement; (vi) the right of Settlement Class Members to object to the Settlement, and how to do so; (vii) the right of Settlement Class Members to request exclusion from the Settlement Class, and how to do so; (viii) the binding effect of a judgment on Settlement Class Members; (ix) the dates and deadlines for certain Settlement-related events (including the deadlines for requesting exclusion or objecting); and (x) the opportunity to obtain additional information about the Action and the Settlement by contacting Plaintiffs' Counsel, the Claims Administrator, or visiting the Settlement Website. *See* Fed. R. Civ. P. 23(c)(2)(B); PSLRA requirements codified at 15 U.S.C. §78u-4(a)(7). The Notice also contains the Plan of Allocation and provides Settlement Class Members with information on how to submit a Claim in order to be potentially eligible to receive a payment from the Net Settlement Fund.

The content disseminated through this notice campaign was more than adequate, as it "generally describe[d] the terms of the settlement in sufficient detail to alert those with adverse

viewpoints to investigate and to come forward and be heard." *Young v. LG Chem Ltd.*, 783 F. App'x 727, 736 (9th Cir. 2019); *Churchill*, 361 F.3d at 575 (same); *Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 330 (C.D. Cal. 2016) ("Settlement notices must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'").

In sum, this combination of individual first-class mailing of the Notice to all Settlement Class Members who could be identified with reasonable effort, supplemented by notice in an appropriate publication, transmission over a newswire, and publication on internet websites, was "the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). Comparable notice programs are routinely approved by Courts in this District. *See, e.g.*, *Wong v. Arlo Techs., Inc.*, No. 5:19-CV-00372-BLF, 2021 WL 1531171, at *2, *6 (N.D. Cal. Apr. 19, 2021) (approving similar notice plan); *Hayes v. MagnaChip Semiconductor Corp.*, No. 14-CV-01160-JST, 2016 WL 6902856, at *4-5 (N.D. Cal. Nov. 21, 2016) (same); *Zynga*, 2016 WL 537946, at *7 (finding individual notice mailed to class members combined with summary publication constituted "the best form of notice available under the circumstances").

CONCLUSION

For the reasons set forth herein and in the accompanying Fredericks Declaration, Lead Plaintiff respectfully requests that the Court grant final approval of the proposed Settlement, approve the Plan of Allocation, and grant final certification of the Settlement Class for settlement purposes. A Proposed Order and Final Judgment will be submitted on reply.

DATED: September 14, 2023

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2023, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

s/ *William C. Fredericks*
William C. Fredericks

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARTIN JOSEPH ABADILLA, et al.,

Plaintiffs,

v.

PRECIGEN, INC., et al.,

Defendants.

This Document Relates to:

ALL CONSOLIDATED ACTIONS

Case No.: 5:20-cv-06936-BLF

CONSOLIDATED CLASS ACTION

[PROPOSED] ORDER AND FINAL JUDGMENT APPROVING CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION

WHEREAS, the Parties[1], through their counsel, have agreed, subject to judicial approval following issuance of notice to the Settlement Class and a Fairness Hearing, to settle and dismiss with prejudice all claims asserted in this Action upon the terms and conditions set forth in the Parties' Stipulation and Agreement of Settlement dated March 1, 2023 (ECF No. 128) (the "Stipulation of Settlement");

WHEREAS, on July 7, 2023, the Court issued its Order Granting Plaintiff's Motion for Preliminary Approval of Class Action Settlement, For Issuance of Notice to the Class, and For Scheduling of Fairness Hearing in this Action (the "Preliminary Approval Order") (ECF No. 135);

WHEREAS, it appears in the record that the Notice substantially in the form approved by the Court in its Preliminary Approval Order was mailed to all reasonably identifiable Settlement Class Members, and posted on the settlement website established by the Claims Administrator in this matter, in accordance with the Preliminary Approval Order;

WHEREAS, it appears in the record that the Summary Notice, substantially in the form approved by the Court, was published in accordance with the Preliminary Approval Order;

WHEREAS, on the 19th day of October 2023, following issuance of notice of the Settlement to the Settlement Class, the Court held its Fairness Hearing to determine: (1) whether the terms and conditions of the Stipulation of Settlement are fair, reasonable and adequate, and should be approved; (2) whether judgment should be entered dismissing, with prejudice, all claims asserted in the Action; (3) whether to approve the proposed Plan of Allocation as a fair and reasonable method to allocate the Net Settlement Fund among Settlement Class Members; (4) whether and in what amount to award Plaintiff's Counsel attorney's fees and expenses; and (5) whether and in what amount to grant any awards to any Plaintiff pursuant to 15 U.S.C. §78u-4(a)(4); and

WHEREAS, the Court has considered all matters and papers submitted to it at or in connection with the Fairness Hearing and otherwise;

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[1] Unless otherwise defined herein, all capitalized terms used herein have the same meaning as given them in the Stipulation of Settlement; *see* ¶1 below.

NOW, THEREFORE, based upon the Stipulation of Settlement and all of the findings, records, and proceedings had herein, and it appearing to the Court upon examination, following the duly-noticed Fairness Hearing, that the Settlement is fair, reasonable, and adequate and should be finally approved, that a Judgment in the form attached as Exhibit B to the Stipulation of Settlement should be entered, and that the proposed Plan of Allocation provides a fair and reasonable method to allocate the Net Settlement Fund among Settlement Class Members;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. This Order and Final Judgment incorporates by reference the definitions in the Stipulation of Settlement (ECF No. 128), and all capitalized terms used herein shall have the same meanings as set forth therein.

2. The Court has jurisdiction over the subject matter of the Action, Lead Plaintiff, all Settlement Class Members, and the Defendants.

3. The Court finds that, for settlement purposes only, the prerequisites for a class action under Rule 23(a) of the Federal Rules of Civil Procedure have been satisfied in that:

(a) the number of Settlement Class Members is so numerous that joinder of all members thereof is impracticable;

(b) there are questions of law and fact common to the Settlement Class;

(c) the claims of the Lead Plaintiff are typical of the claims of the Settlement Class he seeks to represent; and

(d) Lead Plaintiff and Lead Counsel have and will continue to fairly and adequately represent the interests of the Settlement Class.

4. The Court further finds that, for settlement purposes only, the requirements for certification of a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure have also been satisfied in that:

(a) questions of law and fact common to the members of the Settlement Class predominate over any questions affecting only individual members of the Settlement Class; and

(b) a class action is superior to other available methods for the fair and efficient adjudication of the claims at issue, considering:

i. the class members' (lack of) interests in individually controlling the prosecution or defense of separate actions;

ii. the extent and nature of any litigation concerning the controversy already begun by or against class members;

iii. the desirability or undesirability of concentrating the litigation of the claims in this particular forum; and

iv. the (lack of) likely difficulties in managing a class action (given, *inter alia*, that the proposed class here would be certified in the context of a settlement).

5. Accordingly, the Court certifies this action as a class action, solely for purposes of the Settlement, pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure, on behalf of a Class (the "Settlement Class") consisting of all Persons or entities who purchased or otherwise acquired publicly traded shares of the common stock of Precigen Inc. (f/k/a Intrexon Corporation) ("Precigen") (ticker: PGEN, formerly XON) between May 10, 2017 and September 25, 2020, inclusive (the "Class Period"), and were damaged thereby, provided, however, that the following are excluded from the Settlement Class: (i) Defendants; (ii) the past and current officers, directors, partners and managing partners of Precigen (and any of Precigen's subsidiaries or affiliates, including but not limited to MBP Titan LLC); (iii) the immediate family members, legal representatives, heirs, parents, subsidiaries, successors, successors and assigns of any excluded Person; and any entity in which any excluded Person(s) have or had a majority ownership interest, or that is or was controlled by any excluded Persons. Also excluded from the Settlement Class are those Persons or entities listed on Exhibit A hereto that the Court finds have timely and validly requested exclusion from the Settlement Class in accordance with the Court's Preliminary Approval Order.

6. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, for the purposes of this Settlement only, Lead Plaintiff Raju Shah is appointed as class representative of the Settlement Class, and the law firm of Scott+Scott Attorneys at Law LLP is appointed as counsel for the Settlement Class ("Class Counsel").

7. In accordance with the Preliminary Approval Order, the Court finds that the forms and methods of notifying the Settlement Class of the Settlement and its terms and conditions and the rights of Settlement Class Members in connection therewith (a) constituted the best notice practicable under the circumstances; (b) constituted due and sufficient notice of these proceedings and the matters set forth herein (including the Settlement and Plan of Allocation) to all persons and entities entitled to such notice; and (c) met the requirements of due process, Rule 23 of the Federal Rules of Civil Procedure, and Section 21D(a)(7) of the Exchange Act, 15 U.S.C. § 78u-4(a)(7) (as amended by the Private Securities Litigation Reform Act of 1995). No Settlement Class Member is or shall be relieved from the terms and conditions of the Settlement, including the releases provided for in the Stipulation of Settlement, based upon the contention or proof that such Settlement Class Member failed to receive actual or adequate notice. A full opportunity has been offered to the Settlement Class Members to object to the proposed Settlement (and to participate in the hearing thereon), or to exclude themselves from the Settlement Class. The Court further finds that the notice provisions of the Class Action Fairness Act, 28 U.S.C. § 1715, were fully discharged. Thus, it is determined that all Settlement Class Members are bound by this Order and Final Judgment, except for those persons listed on Exhibit A hereto.

8. The Court finds that the Settlement is fair, reasonable and adequate under Rule 23 of the Federal Rules of Civil Procedure, and in the best interests of the Settlement Class. The Court further finds that the Settlement is the result of good faith, arm's-length negotiations; and that all Parties have been represented throughout by experienced and competent counsel. The Court further finds that the Settlement was reached only after, *inter alia*: (a) Lead Counsel had conducted an extensive pre-filing investigation; (b) Lead Plaintiff's filing of an amended consolidated class action complaint and second amended consolidated class action complaint, ; (c) full briefing and

oral argument on the Defendants' motions to dismiss the second amended consolidated complaint; (d) the filing by Lead Plaintiff, after the Court (by Order dated May 31, 2022) had granted Defendants' motion to dismiss without prejudice, and granted Lead Plaintiff leave to amend, of a Third Amended Consolidated Class Action Complaint (the "Operative Complaint"); (f) the production of certain documents by Precigen in anticipation of mediation; (g) Lead Plaintiff's and the Defendants' preparation and exchange of comprehensive pre-mediation briefs, and participation in a day-long in person mediation session in New York on November 16, 2022 under the auspices of a highly experienced mediator of complex commercial cases (the Hon. Layn Phillips, U.S.D.J., ret.), which led to the mediator making an independent "mediator's proposal" to settle the Action on terms consistent with those set forth in the Stipulation; (h) Lead Plaintiff's obtaining of and review of roughly 83,000 pages of documents from Precigen for purposes of confirming the fairness and reasonableness of the proposed Settlement before entering into the Stipulation; and (i) the Parties' negotiation and drafting of the detailed terms of the Stipulation of Settlement based on the mediator's proposal. Accordingly, the Court also finds that all Parties were well-positioned to evaluate benefits of the proposed Settlement against the risks of further and uncertain litigation.

9. The Court further finds that its conclusions as to the fairness, reasonableness and adequacy of the proposed Settlement are further supported by the fact that, as noted above, the terms of Settlement are consistent with the "mediator's proposal" recommended by a highly experienced mediator of complex securities litigation, the Hon. Layn Phillips (U.S.D.J, ret.).

10. The Court further finds that if the Settlement had not been achieved, the Parties faced the expense, risk, and uncertainty of extended litigation in connection with the claims asserted against the Defendants. The Court takes no position on the merits of either Plaintiff's (including the Class's) or Defendants' liability positions, but notes that the existence of substantial arguments both for and against their respective positions further supports approval of the Settlement.

11. Accordingly, the Court gives its final approval to the Stipulation of Settlement, and directs the Parties to consummate the Settlement in accordance with the terms and provisions of the Stipulation of Settlement.

12. All claims asserted against all Defendants are hereby dismissed with prejudice. All parties to the Action shall bear their own costs, except as otherwise provided in the Stipulation of Settlement.

13. Lead Plaintiff and each Settlement Class Member, on behalf of themselves and their Related Persons, shall be deemed to have, and by operation of this Order and Final Judgment shall have, fully, finally, and forever released, waived, relinquished and discharged, and shall forever be enjoined from prosecuting, all Released Claims against each Released Defendant Person, whether or not such Plaintiff or Settlement Class Member executes and delivers a Proof of Claim.

14. Defendants and each of the Released Defendant Persons shall be deemed to have, and by operation of this Order and Final Judgment shall have, fully, finally, and forever released, waived, relinquished and discharged, and shall forever be enjoined from prosecuting, each and every one of the Released Defendants' Claims against each Released Plaintiff Person.

15. Nothing contained herein shall, however, bar any Party, Released Defendant Person, or Released Plaintiff Person from bringing any action or claim to enforce the terms of the Stipulation of Settlement or this Order and Final Judgment.

16. The Court finds that the proposed Plan of Allocation is a fair and reasonable method to allocate the Net Settlement Fund among Settlement Class Members, and Plaintiff's Counsel and the Claims Administrator are directed to administer the Plan of Allocation in accordance with its terms and the terms of the Stipulation of Settlement.

17. The Court finds that the Parties and their counsel have complied with all requirements of Rule 11 of the Federal Rules of Civil Procedure and the Private Securities Litigation Reform Act of 1995 as to all proceedings had herein.

18. Neither this Order and Final Judgment, the Stipulation of Settlement, nor any of the terms and provisions of the Stipulation of Settlement, nor any of the negotiations or proceedings

in connection therewith, nor any of the documents or statements referred to herein or therein, nor the Settlement, nor the fact of the Settlement, nor the Settlement proceedings, nor any statement in connection therewith:

(a) is or may be deemed to be, or may be used as an admission, concession, or evidence of the validity or invalidity of any Released Claims, the truth or falsity of any fact alleged by Lead Plaintiff or any other plaintiff in the Action (collectively, "Plaintiffs"), the sufficiency or deficiency of any defense that has been or could have been asserted in the Action, or any wrongdoing, liability, negligence or fault of the Defendants, their Related Persons, or any of them;

(b) is or may be deemed to be or may be used as an admission of, or evidence of, any fault or misrepresentation or omission with respect to any statement or written document attributed to, approved or made by any of the Defendants or their Related Persons in any civil, criminal or administrative proceeding in any court, administrative agency or other tribunal;

(c) is or may be deemed to be or shall be used, offered or received against any Party or any of their Related Persons as an admission, concession or evidence of the validity or invalidity of any Released Claim or Released Defendants' Claims, the infirmity or strength of any claim raised in the Action, the truth or falsity of any fact alleged by any Plaintiff or the Settlement Class, or the availability or lack of availability of meritorious defenses to the claims raised in the Action; nor

(d) is or may be deemed to be or shall be construed as or received in evidence as an admission or concession against the Defendants, or their Related Persons, or any of them, that any of Plaintiff's or the Settlement Class Members' claims are with or without merit, that a litigation class should or should not be certified, that damages recoverable in the Action would have been greater or less than the Settlement Amount or that the consideration to be given pursuant to the Stipulation of Settlement represents an amount equal to, less than or greater than the amount which could have or would have been recovered after trial.

19. Notwithstanding the immediately preceding paragraph, however, the Parties and the other Released Defendant Persons and Released Plaintiff Persons may file the Stipulation of

Settlement and/or this Order and Final Judgment in any other action that may be brought against them in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, full faith and credit, release, good faith settlement, judgment bar or reduction or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim. The Parties may also file the Stipulation of Settlement and/or this Order and Final Judgment in any proceedings that may be necessary to consummate or enforce the Stipulation of Settlement, the Settlement, or this Order and Final Judgment.

20. Except as otherwise provided herein or in the Stipulation of Settlement, all funds held by the Escrow Agent shall be deemed to be held *in custodia legis* and shall remain subject to the jurisdiction of the Court until such time as the funds are distributed or returned pursuant to the Stipulation of Settlement and/or pursuant to further order of the Court.

21. Without affecting the finality of this Order and Judgment in any way, this Court retains continuing exclusive jurisdiction over all Parties to the Action and the Settlement Class Members for all matters relating to the Action, including the administration, interpretation, effectuation or enforcement of the Stipulation of Settlement, and including any application for fees and expenses incurred in connection with administering and distributing the Settlement proceeds to the Settlement Class Members.

22. Absent further order of the Court, the Court hereby sets the following schedule for completing the administration of the Settlement in this matter:

(a) the Claims Administrator shall complete its review of submitted Proofs of Claim in this matter and calculation of Recognized Claim Amounts for Authorized Claimants within 180 days of the Court's existing deadline for putative Settlement Class Members to submit completed Proofs of Claim;

(b) within twenty-one (21) days of the later of (i) the Claims Administrator's completion of its review of submitted claims or (ii) the date on which each of the conditions set forth in ¶4.14 of the Stipulation of Settlement (including the occurrence of the Effective Date) has been met, Plaintiff's Counsel shall submit a distribution motion (the

"Settlement Class Distribution Motion") to the Court, which shall seek entry of an Order (the "Distribution Order") approving the Claims Administrator's claims determinations and resolving, pursuant to ¶¶4.7-4.10 of the Stipulation of Settlement, any unresolved disputes raised by any Claimants relating to the Claims Administrator's administrative determinations;

(c) unless the Distribution Order provides for a later date, the Claims Administrator shall mail checks distributing settlement fund payments to eligible Settlement Class Members within 30 days of entry of the Distribution Order, which checks shall request that recipients cash them within 60 days;

(d) Except as provided in sub-paragraphs (a)-(c) above, without further order of the Court the Defendants and Plaintiff may agree to reasonable extensions of time to carry out any of the provisions of the Stipulation of Settlement.

23. There is no just reason for delay in the entry of this Order and Final Judgment, and immediate entry by the Clerk of the Court is expressly directed.

24. The finality of this Order and Final Judgment shall not be affected, in any manner, by rulings that the Court may make on Plaintiff's Counsel's Fee and Expense Application.

25. If the Settlement is not consummated in accordance with the terms of the Stipulation of Settlement, then the Stipulation of Settlement and this Order and Final Judgment (including any amendment(s) thereof, and except as expressly provided in the Stipulation of Settlement or by order of the Court) shall be null and void, of no further force or effect, and without prejudice to any of the Parties, and may not be introduced as evidence or used in any action or proceeding by any Person against the Parties, and each of the Parties shall be restored to his, her or its respective litigation positions as they existed immediately prior to the date of the execution of the Stipulation of Settlement.

Dated: _____, 2023

_____
HON. BETH LABSON FREEMAN
UNITED STATES DISTRICT COURT JUDGE